DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	)	

To: The Commission

COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

Of Counsel:

Hank J. Ratner
Senior Vice President,
Legal and Business Affairs
Rainbow Programming
Holdings, Inc.
150 Crossways Park West
Woodbury, NY 11797

Howard J. Symons
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

August 23, 1993

No. of Copies rec'd 0+9
List A B C D E

TABLE OF CONTENTS

DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	)	MM Docket No. 92-264

To: The Commission

COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

Introduction and Summary

Rainbow Programming Holdings, Inc. ("Rainbow"), by its attorneys, hereby submits its comments in response to the Further Notice of Proposed Rulemaking[1] in the above-captioned proceeding.[2]

There is a substantial risk that the proposed channel occupancy limit will reduce the quality and quantity of cable programming by depriving programmers of the most likely sources of investment. The proposed use of the broadcast attribution

[1] Report and Order and Further Notice of Proposed Rulemaking, In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264, FCC 93-332 (rel. July 23, 1993) ("Further Notice").

[2] Rainbow, a wholly-owned subsidiary of Cablevision Systems Corporation, is the managing general partner of several partnerships that provide national and regional programming available to approximately 80,000,000 subscribers collectively. Each of these programming services, which include American Movie Classics, Bravo, and eight regional sports services, is organized as a separate partnership with its own general manager and sales, marketing, programming, and production staffs.

standards -- restricting cable operators to investments of up to five percent in programming services that would not count against the channel occupancy limitation -- needlessly exacerbates this risk. So that some capital remains available for programmers, the Commission should at least provide that equity interests in programming services of up to ten percent are non-attributable. In any case, there is no justification for imposing a channel occupancy limit of less than forty percent.

If the Commission generally retains the five percent threshold, it should take specific measures to ensure the continued availability of new and specialized programming services, either by exempting these services from the channel occupancy limits completely or by raising the attribution threshold applicable to them. The mechanical application of the proposed channel occupancy limits to new or innovative services could stifle their growth, contrary to the statutory goal of encouraging diversity: if forced to choose between the carriage of new or specialized services, on one hand, and established general interest services on the other, operators will inevitably displace the former in favor of the latter. Applying a higher attribution threshold to cable operator investments in new or specialized programming services would recognize the fact that cable operators are a primary source of funding for these services.

So that the proposed limit does not otherwise inhibit the availability of diverse programming services, the Commission should restrict its applicability as proposed in the Further Notice. First, with respect to any given cable operator, the limitation on channel occupancy should apply only to programming services in which that operator holds an attributable ownership interest. As the Commission recognizes, applying the channel occupancy limits to every vertically integrated programmer carried by an operator would substantially reduce the quantity of available programming, without any beneficial effect on competition in the program market. Second, the Commission should exempt local and regional programming services from the channel occupancy limit. Without investments from cable operators within the relevant locality or region, these services would not have been developed and would likely cease to exist. There is no evidence, moreover, that carriage of local and regional services displaces national services.

I. The Commission Should Permit Greater Cable Operator Investment in Programming Services to Avoid Unduly Restricting the Availability of Diverse Programming

A. Because A Higher Attribution Standard Is Likely to Encourage Cable Operator Investment Without Crowding Out Unaffiliated Programming Services, The Commission Should Generally Increase the Threshold for Investments in Programming Services

In enacting Section 11 of the 1992 Cable Act,[3] Congress acknowledged that the substantial investments by cable operators in cable programming services has resulted in a wealth of new and

[3] Cable Television Consumer Protection and Competition Act of 1992, 103 Stat. 1460, 1486, § 11 (hereinafter "1992 Cable Act" or "Act").

diverse programming services.[4] It therefore directed the Commission, in developing channel occupancy limits, to "account for any efficiencies and other benefits" and to not "impair the development of diverse and high quality video programming."[5] Given this mandate and the significant efficiencies associated with vertical integration, a channel occupancy limit below forty percent would be unsustainable.[6]

The evidence already presented in this proceeding clearly establishes a host of public interest benefits associated with vertical integration. In addition to significant efficiencies in the distribution, marketing, and purchase of programming, vertical integration lowers programming costs, reducing subscriber rates, and encourages investment in innovative and riskier programming services.[7] These benefits could be

---

[4] See H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992) (hereinafter "House Report") (citing a number of innovative cable programming services, whose development "would not have been feasible without the financial support of cable system operators"); see also Notice of Proposed Rulemaking, In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C. Rcd. 210, at ¶ 44 (rel. Dec. 28, 1992).

[5] 47 U.S.C. § 533(f)(2)(D), (G).

[6] For purposes of these comments, Rainbow assumes arguendo the constitutionality of the statutory requirement for channel occupancy limits. As the Commission correctly observes, however, the final chapter on the constitutionality of the 1992 Cable Act remains to be written. Further Notice at ¶ 175 n. 169. Even assuming the channel occupancy rules are subject to diminished scrutiny, as the Commission claims, a limitation below 40 percent would be inadequately tailored to the objectives of increased diversity and competition in the programming market.

[7] Id. at ¶ 208.

significantly curtailed by an overly restrictive channel occupancy limit.

Because the proposed forty percent channel occupancy limit would be applied using the restrictive broadcast attribution standards, it will unnecessarily restrict cable investment in programming services. Cable operators are unlikely to invest the time and resources in developing programming services unless they can expect to realize a commensurate return on their investment. If holding an interest of five percent in a programming service would subject that service to the channel occupancy limit, an operator may simply decline to invest at all.

To provide a greater incentive to cable operators to continue to invest in programming services, the Commission should at least provide that equity interests in programming services of up to ten percent are non-attributable. While the non-attribution of such interests may stimulate operator investments in a programming service, a ten percent interest is no more likely than a five percent interest to cause an operator to displace a more popular service in which the operator holds no interest. Cable operators must offer programming that is responsive to the interests of their subscribers. An operator simply cannot disregard the preferences of cable subscribers and carry programming that subscribers will not watch.

Whether or not the Commission revises the attribution standards, there is certainly no justification for a channel occupancy limit of less than forty percent. Given the availability of Sections 12 and 19 of the Act to address discrimination by vertically integrated cable operators and programming services if and when such discrimination occurs,[8] a limit below forty percent would substantially limit the quantity of available programming without any corresponding benefit.

B. If the Commission Does Not Generally Raise the Attribution Standard, It Should Exempt New and Specialized Programming Services From the Channel Occupancy Limits or Raise the Attribution Threshold Applicable to Such Services

Even if the Commission does not generally raise the attribution threshold, it should take specific steps to promote investment in new and specialized programming services.[9] The mechanical application of the proposed channel occupancy limits to new or innovative services could stifle their growth, contrary to the statutory goal of encouraging diversity. As the Congress and the Commission have recognized, cable operators themselves are often the primary source of funding for new and specialized programming services.[10]

These services already face the difficult challenge of establishing a sufficient base of subscribers in order to survive and develop. If they will also be forced to compete for limited

---

[8] 47 U.S.C. §§ 536, 548.

[9] A "new" service could be defined as one that has been offered for fewer than five years. To avoid involving the Commission in a content-based analysis, a "specialized" service could be defined as one with a penetration of fewer than one-third of all cable households nationwide.

[10] House Report at 41; <u>Further Notice</u> at ¶ 208.

channel capacity with the established general interest programming services in which an operator also holds an attributable interest, they are less likely to survive: forced to choose between the carriage of new or specialized services, on one hand, and established general interest services on the other, operators will inevitably displace the former in favor of the latter. The "alternative" available to a cable operator -- avoiding the channel occupancy limitations with respect to new and specialized programming by reducing its investment in such programming below the attributable level -- will serve only to diminish the already circumscribed sources of funding for such programming.

While the Commission recognizes the importance of continued multiple system operator ("MSO") investment in new programming services, it has tentatively concluded that a general exception might undermine the effectiveness of the limits without offering any additional benefits.[11/] The Commission can point to no evidence, however, that an operator would displace popular general interest programming -- which is necessary to attract and hold large numbers of subscribers -- with a "narrowcast" service in which it happens to hold an ownership interest. Indeed, an operator is unlikely to engage in such self-defeating activity. To the extent that a general exemption may be subject to abuse,

---

[11/] Further Notice at ¶ 221.

the Commission can remedy that problem if and when it actually occurs.[12]

Because new and specialized services enhance diversity, they warrant the Commission's support rather than diminished opportunities for carriage.[13] An operator's ownership interest in such services should not be considered "attributable" for purposes of applying the channel occupancy limits.

If the Commission chooses not to exempt new or specialized services from the channel occupancy limits, then it should apply a higher attribution threshold to cable operator investments in these services -- for instance, by permitting an operator to hold an interest of up to ten percent without triggering the limitations on channel occupancy. Such a policy would enable cable operators to continue to fund the development of programming services that often have no other available source of funding, without creating any greater risk of anticompetitive conduct that the statute seeks to avoid. As noted above, an operator with a share of even ten percent in a programming

---

[12] See id. at ¶ 227 (discussing proposal to review periodically the channel occupancy limits). A blanket exemption for new and specialized programming services would better serve the goal of ensuring diversity than a cumbersome waiver process that would tax the resources of the Commission and the programmers without any corresponding public benefit.

[13] In this respect, new and specialized services are directly analogous to minority programming services, which the Commission has proposed to exempt from the channel occupancy limits. See id. at ¶ 207 (proposing "to allow carriage of additional vertically integrated programming services, beyond the 40% limit, if such services are minority-controlled or are targeted to a minority audience.").

services is no more likely than one with a five percent share to displace an established general interest programmer in which it holds no ownership stake.

II. The Commission Should Adopt Its Proposals to Restrict the Applicability of the Channel Occupancy Limitations

So that the proposed channel occupancy limits do not unnecessarily inhibit the availability of diverse programming, the Commission should restrict their applicability as proposed in the Further Notice.

Thus, with respect to any given cable operator, the limits should apply only to programming services in which that operator holds an attributable interest. The Commission correctly recognizes that a cable operator has little opportunity or incentive to favor programming services that are affiliated with a rival MSO.[14] Restricting the carriage of programming services affiliated with any cable operator would "severely inhibit MSO investment in programming services."[15]

Rainbow also supports the Commission's proposal to exempt local and regional networks from the channel occupancy limits in order to encourage the development of such programming.[16] As the Commission correctly notes, Congress intended to encourage

---

[14] Id. at ¶ 181.

[15] Id.; see also id. at ¶ 182 ("Such a restriction would be unduly burdensome on MSO investment in cable programming and would be contrary to the purpose of the statute.").

[16] Id. at ¶ 219.

the development of locally responsive programming.[17] Much of this programming has been developed with the financial support of the cable operators in the relevant localities and regions; indeed, such programming did not even exist before cable operators took the initiative to fund it.[18] To apply the channel occupancy limitations to this programming could deprive it of its only significant funding source and means of distribution. Such a result would be contrary to the statutory admonition against inhibiting the availability of diverse programming sources.[19]

Conclusion

The Commission should increase the five percent threshold for attributing ownership interests to avoid unnecessarily restricting investment in cable programming services. Whether or not the Commission does so, however, there is no justification

---

17/ See id. at ¶ 219 and n.218 (citing 1992 Cable Act, § 2(a)(10)).

18/ See Comments of Cablevision Systems Corp. in MM Docket No. 92-264 (filed Feb. 9, 1993), at 4-6.

19/ See note 5, supra.

The Commission seeks comment on the definition of a "local" or "regional" programming service. See Further Notice at ¶ 219. Like the definition of "specialized" services contained in note 9, supra, Rainbow would propose defining a "local" or "regional" programming service on the basis of its distribution rather than its content. For instance, a service that is available in a discrete geographic region to less than one-third of all cable households nationwide, even if a de minimis number of subscribers reside outside of the region or locality where the service is primarily offered, would be exempted from the channel occupancy limits.

for imposing a channel occupancy limit below forty percent. Given Congress's commitment to assuring a wide diversity of programming and the difficulty of establishing new or specialized services, the Commission should revise its proposed rules to exempt such services or, at a minimum, to permit a greater degree of non-attributable cable operator investment in them. The Commission should also adopt its proposals to apply the ceiling only to programming services in which the affected cable operator actually holds an attributable ownership interest and exempt local and regional programming services.

Respectfully submitted,

RAINBOW PROGRAMMING HOLDINGS, INC.

Howard J. Symons/gal

Howard J. Symons
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

Of Counsel:

Hank J. Ratner
Senior Vice President,
Legal and Business Affairs
Rainbow Programming
Holdings, Inc.
150 Crossways Park West
Woodbury, NY 11797

August 23, 1993

D19953.3